

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 324 of 2020

STATE

vs.

MOSESE NAULU

Counsel: Ms. J. Fatiaki for the State
Ms. T. Kean for the Accused

Date of Hearing: 16th to 18th May 2022

Date of Closing Submission: 18th May 2022

Date of Judgment: 20th May 2022

JUDGMENT

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 18th January 2021:

COUNT ONE

Statement of Offence

RAPE: contrary to Section 207 (1) and (2) (b) of the Crimes Act, 2009.

Particulars of Offence

MOSESE NAULU, between the 10th day of October 2020 and the 11th day of October 2020 at Monfort Boys Town in the Central Division, penetrated the vulva of **PAULINI MARIA TARAU** with his tongue, without her consent.

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: contrary to Section 210 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

MOSESE NAULU, on the 11th day of October 2020 at Monfort Boys Town in the Central Division, unlawfully and indecently assaulted **PAULINI MARIA TARAU**, by squeezing her breasts with his hands.

2. Upon entering a plea of not guilty by the Accused, the matter heard between the 16th and 18th of May 2022. The Prosecution presented the evidence of 5 witnesses. The accused gave evidence for the Defence. Subsequently, the Court heard the oral submissions of the learned Counsel of the Prosecution and the Defence. Having carefully considered the evidence presented during the hearing and the respective oral submissions of the parties, I now proceed to pronounce the judgment.
3. To prove the rape count the prosecution should prove that:
 - i) The Accused,
 - ii) did penetrate the vulva of the Complainant with his tongue,
 - iii) the Complainant did not consent to the Accused to so penetrating her vulva with his tongue,
 - iv) the Accused knew or believed or reckless that the Complainant was not consenting for him to so insert his tongue in that manner.

4. For the accused to be found guilty of “sexual assault” under section 210 (1)(a), the prosecution must prove beyond reasonable doubt, the following elements: (i) the accused (ii) unlawfully and indecently (iii) assaulted (iv) the female complainant.
5. Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the accused beyond reasonable doubt. “Assault” is to apply unlawful force to the person of another without his or her consent. The “assault” must be considered “indecent” by right thinking members of society.
6. The ingredients of Sexual assault under 1st limb of section 210 and indecent assault under section 212 of the crimes Act are the same except for the titles to the respective sections. Thus in general, sexual assault will be involuntary sexual contact that occurs through the Accused's use of force, coercion or the victim's incapacitation. The law will consider the victim incapacitated if he or she did not have the mental ability to understand the nature of the sexual acts, or if the victim was physically incapable of indicating her unwillingness to participate in the sexual conduct. Common examples of these charges may arise from the use of alcohol or date rape drugs, both of which can make it impossible for a victim to legally consent to sexual conduct.
7. The accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the accused’s guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the accused’s guilt, or if there be any hesitation in my mind on any of the ingredients or on the of evidence or led by the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. As the Accused has given evidence in this case if this court accepts his evidence or is unable to reject or accept his evidence then too the accused is entitled to a finding in his favour.

8. The following facts are admitted,
 - a) The name of the Accused is Mosese Naulu ["Mosese"], aged 39 years old at the time of the alleged incident. Mosese was born on 05th December 1980.
 - b) The name of the complainant is Paulini Maria Tarau ["Paulini"].
 - c) At the time of the alleged incidents, Mosese was residing at Monfort Boys Town with his wife namely Lusiana's family.
 - d) Sometime between 10th and 11th October 2020, Mosese joined Mike Richard ["Mike"] and Michael Francis Colati ["Michael"] at their home at Monfort Boys Town and consumed liquor together.
 - e) Paulini was medically examined on 13th October 2020 at the MSP Clinic, Suva.

Summary of the Prosecution evidence

9. The prosecution led the evidence of PW1 Paulini Tarau the complainant, her mother PW2 Lasaqa, PW3 Mike Richard, PW4 Michael Colati and PW Ana Maria. Paulini was 16 years of age and her mother is Miriana lived with her father and siblings. The Accused Mosese was in a relationship with Luciana the sister of Paulini's Father. Ana is the daughter of Luciana and Paulini and Ana are cousins. Michel and Richie (Mike) are brothers. At the relevant time all of them have been living in the same neighbourhood in Monfort Boys Town.
10. According to the evidence of the prosecution witnesses on the 10th of October 2020 being Fiji Day and a Saturday the people were celebrating in their house mainly by organizing kava or other drinking parties. On this day Paulini had gone out with some of her friends to Albert Park and returned to Monfort around 10.00 p.m., and had been invited to Michael's veranda where there was a drinking session on. Paulini and two of her friends have gone there. Michael and his brother Richy have been at this drinking session with a few others and after Paulini arrived the drinking session has continued into the night. Paulini's friends appear to have left quite early the party continued with Michael, Richy, Paulini and two others. Close to mid-night the accused has come to join this drinking party. But soon after the accused arrived his partner Lusiana has come up to the road and the accused has gone up to her had a loud conversation and come back. Then Lusiana had brought his clothes and thrown it on the road and gone back. With these happenings two other participants of the drinking session have left. Paulini has shortly thereafter 'got knocked out' due to drinking and has slept in the veranda towards the extreme corner. Michael, Richy and the Accused have continued to drink when the Accused has suddenly

approached Paulini who was knocked out, removed her shorts and the panty and started to lick her vulva. Michael and Richy have attempted to stop this and the accused has reacted violently and threatened to kill them if they were to tell this to any other. Michael had not wanted any incident but tried to sort it out peacefully. Then he had managed to wake up Paulini to some extent, got her on her feet and taken her to his mother's house which was also in the neighbourhood. Paulini had spent the night at that house. Michael too had remained there. With this incident Richy has concluded the drinking party and gone into the house and slept.

11. According to Paulini, on the following morning after waking up she had gone across to Ana's house which was also in the vicinity. Ana being her cousin who was married has given her room for her to rest. Ana's step-father is Mosese. Ana, her husband, Ana's mother and her twin sister have been in that house on that day. They appear to have occupied three separate rooms. After Paulini went to rest in the room Ana had seen Mosese walk in to that room. She had been somewhat puzzled. From outside the room she had been able to see the inside and has seen the accused touching her breasts over the clothes and down to the trousers. Ana has thought of her mother and come out of the kitchen then Paulini has also come out and called Ana. She had also seen the Accused coming out with a cigarette. As Paulini wanted to say something she has taken her into a room and Paulini had said that Mosese touched her breast and threatened to *eat her 'mimi' again that night*. After that Paulini had gone back to the room and slept.
12. According to Paulini the accused had come in shared a cigarette and then touched her breast and down to her pants and then Mosese has said, 'I will eat your vagina once again in the night'.
13. A day thereafter on the following Monday certain rumors have been circulating of something Mosese had done to Paulini. Ana has then inquired from Paulini and she had told her that on the previous night when she was knocked out and was woken up she saw her trousers pulled down to her knees and Mosese was licking her. However Paulini had said that she could not remember anything else. This had been brought to the notice of Paulin's mother and then with the intervention of another neighbor who happened to be a police woman this had been reported to the police.

The Analysis of Prosecution Evidence

14. At the outset let's consider the credibility and the veracity of Paulini's evidence. During cross examination it transpired that she had not told the police that she saw Mosese licking her when she was woken up. Paulini accepts and admits that she in fact did not tell the police. The reason being that she was shy and ashamed to say this. Is this a good enough reason to explain the failure to mention an important fact? The answer is not straight forward. It requires further analysis.

15. If I may consider this further, it is common ground that Paulini was drunk and knocked out at a certain time. She was almost in an unconscious state due to being intoxicated. In this state she was left there in the veranda lying down. According to Michael and Richy accused has removed her trousers and panty and licked her private parts. Then there had been some attempt to stop the accused. However as it was not successful Michael has woken up Paulini and taken her to his parent's house. The following morning around 6 a.m., or shortly thereafter Paulini goes to Ana's house and sleeps in Ana's room when the accused has gone into this room and is alleged to have touched her breast and over her trousers.

16. Now the matter for consideration is did Paulini see that accused licking her when she woke up and was she able to remember that. The fact that she was so drunk and knocked out clearly puts her into a state of mind where her senses will not be alert or responsive as a normal person. So even if she was woken up momentarily could have she registered and remembered exactly what she saw at that moment? Paulini clearly says that she had a faint recollection like a dream. When she was asked as to why she went to Ana's house the following morning where Mosese also lived if such a thing had happened to her on the previous night, her response was that it was like a dream and she did not believe that her step-father could do such a thing. This answer clarifies the exact manner and nature of her observation and re-collection at that moment when she was woken up. The following morning she appears to have had only a hazy recollection of some event which to her was like a dream. This is highly probable considering that she was a first time drinker having consumed almost 10 glasses of some intoxicating brew. So if she was left to herself without any other having seen this and not being told subsequently of what happened that night she may have not clearly remembered, or believed what she faintly

remembers is reality. This would have been more so because she was unable to believe that her step-uncle would do such a thing to her. In this state of mind and in hangover she going to very house where Mosese also lived the following morning is possible. It is this state of mind, the disbelief and shame that her own uncle has done this, that has prevented her from telling the police what she saw.

Belatedness and not telling anybody on her own.

17. Paulini reveals the licking incident only upon being asked by Ana on Monday after hearing rumors. By this time Paulini has met Michael and Richy separately and has found out that Mosese had licked her vulva (which witnesses refer to as vagina). Thus considering this sequence of events Paulini had been told by two others who were present as to what had happened. This in conjunction with the dream like faint and hazy recollection has enable Paulini to recall and recollect the fact that she was awoken and what she saw at that point. Paulini was a girl of just 16 years and considering the culture and respect for elders and the iTaukeian family dynamics she being unable to come to terms with this is possible. She was afraid of her parents especially as she had taken part in drinking would create a guilty conscious and then blame herself and prompt her to hide this incident. In these circumstances the delay in revealing is reasonable, probable and realistic.
18. Now I will consider the demeanor and deportment of Paulini. Throughout her examination in chief as well as cross examination she answered the questions very promptly and directly. When she was extensively cross examined on various events I observed that her manner of responding clearly indicated that she was recalling what she had in fact experience and answering the questions. She never attempted to conceal any fact even if it was in favour of the accused. She admitted the fact of sharing the cigarette with Mosese because she wanted to smoke. She was not revengeful in responding to cross examination and demonstrated no ill will or hatred towards the accused. Her position was that she didn't believed that her uncle would do anything like that. There was not even a suggestion of Paulini deliberately lying on her own or on the instigation of any other against Mosese. Neither did the accused make such an allegation either. Considering these circumstances I can safely conclude without any hesitation that her demeanour and deportment were consistent with that of a truthful witness.

Contradictions inter se

19. During the submissions the learned defence counsel highlighted several contradictions between Paulini, Michael and Richy which she submitted are vital and affect the credibility of the prosecution's evidence in its totality. Let me consider these contradictions. These are:
1. Paulini says that the following morning Michael came to Ana's room and was teasing her about what happened previous night. However Michael does not say this but in the contrary he takes up the position that he did not speak to Paulini about this.
 2. Paulini said that she was awakened by slapping her face with water. Michael and Richy does not say that they slapped her face with water to wake up.
 3. According to Michael and Richy, Paulini got off the bus and came to his house with her friends and the friends left leaving Paulini. But according to Paulini she admits coming to Michael's house but takes up the position that she went to her friend's house for a change of clothes and then returned.
20. These are some of the said inter se contradictions. It is almost an admitted fact all these witnesses including the accused were drunk and intoxicated during these events and were drinking until the early hours of the following day. In these circumstances and considering the human nature of remembering things in that state, contradictions of these nature are to be excepted and not unusual. As regards the position taken up by Michael that he did not tell or meet Paulini it appears to be a substantial contradiction. However, as stated above Michael himself was drunk and drinking until early hours of 11th. After a short nap even if he happened to set about and met Paulini and casually teased her he not being able to recall that event after lapse of sometime is probable. What is important is that this are certainly not a contradictions arising due to the utterance of falsehood but it is more due to faulty memory. Accordingly the several inter se contradictions in my view does not affect the credibility of prosecution evidence or witnesses Paulini, Michael and Richy.

Credibility of Ana's Evidence

21. Now let's consider the credibility and the veracity of Ana's Evidence. Ana is the step daughter of the accused and also she is a cousin of Paulini. During her cross examination there was neither a suggestion made that she was deliberately lying against Mosese nor did Mosese in his

evidence taken up that position or make such an allegation. Ana and Mosese on and off live in the same household and up to date Mosese continues his relationship with Ana's mother. In these circumstances there is absolutely no reason for Ana to give false evidence against Mosese. What I observe is that Ana is wedged between two of her family namely cousin Paulini and her step-father Mosese. Her evidence is directly relevant to count number 2, touching Paulini's breast by Mosese and is of twofold. Firstly that Paulini telling, soon thereafter the incident that Mosese touched her breast and top of the trousers. Secondly that she herself saw this happening. However the fact that she saw this happening is not in the police statement (an omission). Ana says that she told the police but it had not been recorded. Ana was called as a first complaint witness to whom Paulini is alleged to have told the incident of licking, for the first time. In these circumstances the police may have recorded that and left it there. This is a possibility and the other is that Ana had not told this to the police in view of the relationship with the accused and the victim. It is probable that she will not volunteer more than was asked by the police in these circumstances. Whatever may be the reason now let's consider if her claim that she saw Mosese touching her breast is probable. Ana says that she was outside the room in which this happened and seated on a bed from where she could see the inside of this room. Accused in his evidence admits that this room does not have a door and there is a bed in a room in an opposite room and from which place the inside of the room where Paulini and Mosese were is visible. So it is common ground and undisputed that Ana was at home and she could have seen the happenings from outside as claimed by Ana. Therefore in view of these circumstances the omission does not affect the credibility or the evidence of Ana to any considerable extent.

22. As for her demeanour I found that she was eager to say the minimum and to leave court. This certainly due to her common link to both to the accused and Paulini and her family ties. So I can clearly conclude that Ana said the minimum and what she said was truthful. She is not a partial witness to the prosecution. Accordingly I accept her evidence as reliable and truthful.

The Defence Evidence

23. The accused gave evidence and the sequence of events between the 10th and the 11th as narrated by the prosecution witnesses and his presence at the time the alleged act were are generally accepted by the accused except the following fact which he denies or narrates differently. They

are he denies Lusiana coming and throwing clothes but admits she coming there and talking. Accused denies licking or removing clothes of Paulini and touching her breast on the 11th. The accused states that Paulini was taken into the house where the drinking session and Michael and Richy alternatively went in and he continued to drink till the sunrise of the 11th. Apart from these denials and differences by and large the prosecution and the defence are on common ground as far as other facts are concerned.

24. Thus the matters in dispute and which this court required to decide are, if the act of licking the vulva on the 10th and the act of touching the breast on 11th was committed by the accused as alleged. As to the fact the accused's presence at the relevant times is admitted by the accused and is not in dispute. Thus, it is a denial by the accused and this denial will correspondingly and necessarily mean that the allegations made against him and the evidence to that effect is false. To that end it is that the witnesses have fabricated a false case against him.

25. Now I will consider if there is any indication or any colour of fabricating false allegations that emanates from the circumstances or evidence of this case. Firstly let's consider how this complaint reached the police. The matter came to light and became a complaint to the police due to rumors. To that extent neither of the witnesses nor the complainant had initiated nor being instrumental in making a complaint against the accused. In the usual course of human conduct if one was minded to fabricate and falsely implicate the accused such person would directly bring it to the notice of the relevant parties. Here the suspicion if at all will be on Michael and Richy. Did they take the girl into the house and do something? Did Mosese see this? In these circumstances could it be that Michael and Richy to clear themselves had made up a false story. This is one possibility in favour of the accused. So let me consider it. In the first instance Mosese did not tell anyone or complain about anything alleged to have been done to Paulini by Michael or Richy. Thus, why should Michael and Richy then think of falsely spreading a rumors against Mosese? It is improbable.

26. Besides the complaint of licking the vulva there is also a complaint of touching the breast on the 11th. Michael or Richy has nothing to do with this. This comes out from Paulini and Ana. Does this mean that Paulini and Ana joined together with Richy and Michael to make up a false allegation? There is absolutely no rational reason or logical basis to suspect or infer that Paulini and Ana had any reason to make a false allegation against Mosese. Paulini and Ana are family with Mosese, Michael and Richy are not family but neighbours. I see no reason in logic or in evidence to suspect or conclude that all these person would connive to fabricate a false story in this form. Such a proposition as I see is improbable as improbable can be. Accordingly the position taken up by the accused becomes extremely improbable. In these circumstances the evidence and the position taken up by the accused in denying on the basis that they are fabricated and false is so improbable that the Accused evidence must in all probabilities be false. Accordingly I am left with no option but to reject the accused's evidence in its totality.

Have the charges being proved?

27. Merely because the accused's evidence is rejected as been improbable and false, it does not in any way prove the case against the accused. The burden of proving all ingredients against the accused beyond reasonable doubt is with the prosecution. Thus, now I will consider if the prosecution has proved their case on the required criminal standard.

Count No.1

28. To prove the allegation of Rape in count No. 1, the prosecution must necessarily prove that the accused did penetrate the vulva of the victim with his tongue. At what point will there be penetration of the vulva? Justice Prematilaka in **Volau v State** [2017] FJCA 51; AAU0011.2013 (26 May 2017) has vividly described the distension between the vulva and the vagina, the demarcations of the relevant components of the female genitalia in the following form;

“It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina,

also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.”

29. According to which the outer or the external manifestation of the female genitalia is the vulva which starts from the ‘*pubic mound the rounded fleshy protuberance situated over the pubic bones and including labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra*’ up to the hymen. In a count of rape of whatever form, penetration is a necessary component and in the present case the prosecution should prove that the tongue of the accused did **penetrate** the vulva to some degree. Penetrate as we understand is to go through or to pass through. Thus penetrating the vulva when considered with the above description will be to go through at least in the slightest degree between the labia majora. In the present case Paulini was drunk at the time and knocked out. She if at all has only a hazy recollection of Mosese licking her ‘mimi’ or her private part or her vulva area. She does not say that she felt the tongue penetrating within labia majora or touching the inner aspect. Then we have the eye witnesses Michael and Richy. According to Richy the accused had pulled her pants down and gone down on Paulini licking her vagina and that he put his face on her private parts and licked her. Michael also says that he saw the accused licking her vagina. It is more probable than not, that when these witnesses used the term vagina they were confused with the terms vulva and the vagina as expounded in *Volau v State (supra)*.
30. That being so let’s consider the other evidence and the attendant circumstances. Licking in this case was possible only for a brief moment as Richy and Michael intervened and took Paulini to their mother’s house. The evidence is that her shorts were somewhere close to her knees. Thus parting her legs may be restricted and correspondingly gaining access in to the vulva too will be inhibited. There is no evidence as to how the legs were positioned when this act was performed. Though there is direct evidence of licking the external or the outer aspect of the vulva however in the circumstances of this case it does not by itself necessarily directly prove that the tongue in fact penetrated the vulva. This will have to be inferred from the proved

circumstances. Considering the brief time period immediate reaction of Richy and Michael and the manner in which the girl was the inference that the accused may have not been able to penetrate the vulva is a probable inference. Similarly there is a possibility that a person driven by an extreme sexual desire to lick the vulva he will most likely insert his tongue into and within labia majora. When there are two probable inferences one in favour of the accused should be preferred. Thus, I am of the view that the prosecution has proved beyond reasonable doubt that the Accused did lick the vulva of the complainant has failed to prove on the required criminal standard that the tongue penetrated the vulva even in a slight degree. Accordingly count number 1 is not proved to that extent.

31. However there is clear proof of the accused licking the outer vulva area of the complainant's genitalia. Thus the licking of the vulva is proved beyond reasonable doubt. Clearly this had been done without her consent. To that extent the accused being step uncle of 39 years of age licking the vulva of a 16 year old step-niece is conduct which is indecent by any decent man's standard and in the normal course of event this act is of a sexual nature. Thus it clearly amounts to a sexual assault contrary to Section 210 (1) (a) of the Crimes Act.
32. Considering Count 2 the evidence of this offence comes directly from Paulini she states that the accused did touch her breast on the 11th. She had not consented or liked this. She had immediately thereafter told this to Ana. Ana says that Paulini looked upset and wanted to confide something. This conduct clearly shows that Paulini had faced something which she was not happy with and happened without her consent. That's why she reacted in that way and told Ana that her breast was touched by the accused. In addition to this Ana claims to have seen this.

Conduct of the Accused

33. On the 10th night accused goes to Michael's house and joins the drinking party of which Paulini was also there. Shortly thereafter his partner Luciana comes there and has a heated exchange of words with him and then brings his clothes and throws on the road. The accused continues to remain here. These facts does indicate that Lusiana did not like the accused to be here that being so the accused remained there. Then the following morning when Paulini goes to Ana's room

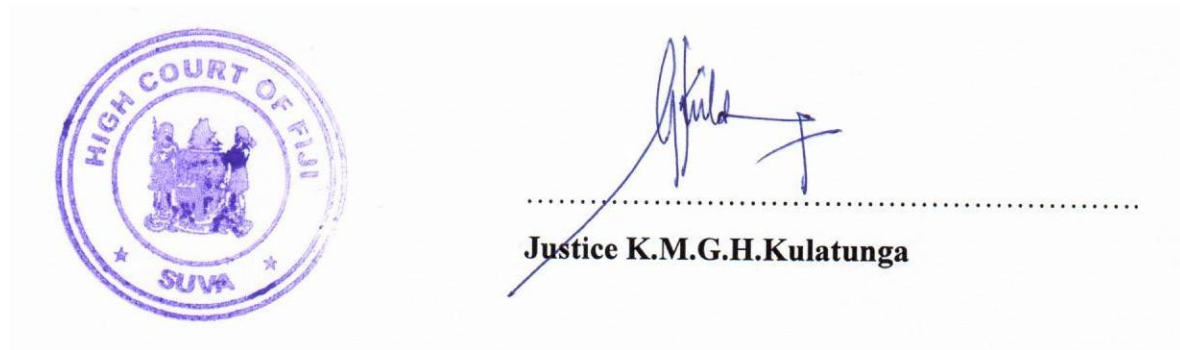
accused walks in to that room when she was sleeping alone. Is this conduct normal and decent? I do not think so. It clearly indicates or leads to the inference that the accused had been entertaining some kind of ulterior motive of approaching the girl in solitude. His offering and sharing the cigarette is more of grooming and getting familiar to achieve his ulterior object. What was this ulterior motive it? It was manifested by touching her breast and her trousers on top. This shows that he has entertained a sexual desire over this girl who happens to be his niece. When she resisted what did he say? He said 'I will eat your vagina once again in the night'. What does this mean? It means firstly that he is threatening to lick her vulva once again which inherently means he had already done it. That is an acknowledgement of having licked the vulva on the previous night. Secondly that he will do it again. This clearly shows and establishes that the accused had entertained a great sexual desire over this young niece of his to satisfy his desires. This utterance by the Accused confirms and to a certain extent admits the licking of the vulva on the 10th. Then also it proves that his touching of her breast on the 11th was sexually motivated deliberate act. It is an assault of an indecent nature and this evidence clearly proves all ingredients of count 2.

Conclusion

34. As evaluated herein above, the defence taken up that these are false allegation being extremely improbable and being so improbable I have concluded defence is false and rejected it in its totality. In these circumstances the said defence put forward by the accused cannot and does not in any way create a doubt. Prosecution evidence is credible and reliable.

35. I have held that the prosecution has failed to prove the act of rape as charged by Count No. 1 as penetration of the vulva by the tongue is not proved, however I am satisfied that the prosecution has proved beyond reasonable doubt that the Accused did on the 10th of October 2020 lick the vulva of the Complainant and thereby has proved the alternate charge of sexual assault contrary to Section 210 (1) (a) of the Crimes Act. Accordingly acting under and in terms of section 162(1)(f) of the Criminal Procedure Act I find the Accused guilty for the said alternate count of sexual assault and convict him accordingly. Subject to the conviction of the alternate charge as afore stated I hold that the accused is not guilty of the charge of rape made as made by count No. 1.

36. At the submission stage both Parties were put on notice of the possibility of considering this alternate count and were heard.
37. Further I hold that the prosecution has proved beyond reasonable doubt count No. 2. As such, I find the accused guilty of the said count No. 2 as charged and convict the accused in respect of the said count No. 2.



At Suva
20th May 2022

Solicitors
Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for the Accused